

(29,141)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 591.

THOMAS N. BRADY, APPELLANT,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND  
WILLIAM SPRY, COMMISSIONER OF THE GENERAL  
LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

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1 Court of Appeals of the District of Columbia.

No. 3721.

THOMAS N. BRADY, Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, et al.

Supreme Court of the District of Columbia.

In Equity.

No. 39017.

THOMAS N. BRADY, Plaintiff,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,

*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 *Bill of Complaint.*

Filed May 10, 1921.

In the Supreme Court of the District of Columbia.

In Equity.

No. 39017.

THOMAS N. BRADY, Plaintiff,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office, Defendants.

To the Honorable the Justice of said Court, Holding a Special Term as a Court of Equity:

The Plaintiff states as follows:

1. That the Plaintiff, Thomas N. Brady, is a citizen of the United States and a resident of the State of Arizona, and brings this suit in his own right.

2. That the defendants, Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, are both citizens of the United States, and temporarily residents of the District of Columbia, and are sued therein for acts done and threatened by them in their official capacities, respectively.

3. That on the 10th day of November, 1913, the following described land, viz., Lots 5, 7, E.  $\frac{1}{2}$  S. W. 4 Section 6, Township 1 North, Range 6 East, G. and S. R. M. Arizona, being vacant public land subject to settlement and entry under the homestead law, one William Rattkammer made homestead entry numbered Phoenix 023,727, for all of the above described land.

4. That on the 27th day of October, 1915, Harry S. Harner filed Contest numbered 3490 against the entry of said William Rattkammer and made due publication of notice in accordance with law and the regulations of the Department.

5. That no answer was made by said Rattkammer, and in due and regular course and in accordance with the regulations, the record was transmitted to the Commissioner of the General Land Office for consideration and action.

6. That thereafter, on the 6th day of January, 1916, the Commissioner by letter "H" of that date, canceled said entry of said Rattkammer.

7. That on the 27th day of December, 1918, the Register and Receiver of the Land Office at Phoenix, Arizona, in which land district said land is located, having entered said cancellation of the entry of Rattkammer on their records, as required by the Regulations, issued preference right notice to said Harner, and transmitted it to him at Mesa, Arizona, his record address, in all things according to the law and the regulations of the Department.

3      8. That on or about the 1st day of January, 1919, the plaintiff being duly qualified under the homestead law, and no entry having been made by said Harner under and in accordance with the preference right to make entry of which he had been duly notified at the address given him he was entitled to, under the Act of May 8, 1880, by virtue of his successful contest, within thirty days from said allowance notice therefor, the said land became and was public land of the United States subject to settlement or entry by any one qualified to make such settlement or entry.

9. That on or about said first day of January, 1919, the plaintiff being duly qualified therefor, made due homestead settlement, with his wife and two children, moved into a vacant, unoccupied cabin on said land and established residence thereon in accordance with the Homestead Act of — —, 1862, and any pertinent amendments thereto which may have been made, and continued and still continues to reside thereon with his family, and has ever since complied

with the requirements of the homestead law as to residence, improvement and cultivation.

10. That notwithstanding his visible, open and notorious residence on said land with his family, one Rudolph L. Larson, on the 17th day of February, 1919, was illegally and wrongfully permitted to make homestead entry, Phoenix 041,350 for all of said land.

11. That on March 3, 1919, the plaintiff, Thomas N. Brady, filed contest under the Act of 1880, against said Larson, alleging said prior settlement and right thereunder, notice of which was duly served on said Larson, and answer filed by him.

12. That said contest case was set down to be heard by the Register and Receiver on the 15th day of April, 1919.

13. That on the 14th day of April, 1919, one Lillie S. Harner, the wife of said Harry S. Harner, filed petition to intervene under the Act of Oct. 22, 1914, (38 St. 766), as a deserted wife, which application was allowed by the Register and Receiver on the 15th day of April, 1919.

14. That all parties appeared in person and by their attorneys, and on the 23rd day of April, 1919, the hearing took place.

15. That on April 30, 1919, the Register and Receiver held and decided that "the case is so complicated that it is hard to arrive at the legal status. However, we are of the opinion that Mrs. Harner has more right to the land than either the contestant or the contestant," and recommended that the entry of Rudolph Larson be canceled and that Lillie S. Harner be allowed to enter the land.

16. Appeal was duly and timely taken by both Brady and Larson, and on the 1st day of February, 1920, the said decision was affirmed by the Commissioner of the General Land Office and the entry of Rudolph Larson canceled, the contest of Brady dismissed, and the allowance of Mrs. Harner's entry directed therein and thereby, under her application 041781, "if otherwise qualified".

17. From this decision, both Brady and Larson duly appealed, and on the 20th day of October last the Department affirmed the decision of the Commissioner of the General Land Office.

18. Motion for Rehearing was duly filed by plaintiff, alone, and on January 1, 1921, the Department denied the motion for rehearing, dismissed the contest of Brady, and awarded the land to Mrs. Harner.

19. Thereafter, to wit, on the 25th day of January 1921, Brady filed petition for the exercise of the supervisory authority of the department and for reconsideration.

20. That February 9, 1921, the Department denied said petition.

21. And plaintiff says that he has now completely exhausted his right of appeal, rehearing and prayer for the exercise by the Sec-

retary of his supervising authority in his behalf, in said Department of the Interior and in said General Land Office, in respect of his claim to said land and that no further opportunity for hearing of the question aforesaid or for further assertion therein of his claim to said tract of land, is afforded by the regulations and rules of practice of said Department, or by any law or act of Congress in such case made and provided; and that his only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid, and which rulings, as plaintiff is advised by counsel, and accordingly so avers, are erroneous in matter of law.

22. Plaintiff states that under the law and in accordance with the decisions and rules and regulations of the Interior Department, he obtained a right to enter the land which is prior and superior to that of either Rudolph L. Larson, the entryman, or Lillie L. Harner, the Intervener.

23. That by the prosecution of his contest against Larson's illegal entry, wrongfully allowed, and its cancellation as the result of his said contest, and his payment of land office fees, he also obtained a prior right to make entry for thirty days after its cancellation, which right is statutory and beyond the control of and denial by the said Secretary of the Interior.

24. That said defendant, The Secretary of the Interior, acting by and through the defendant, the Commissioner of the General Land Office, illegally, wrongfully, arbitrarily and capriciously dismissed his said contest, and illegally, wrongfully, arbitrarily and capriciously permitted the said Lillie S. Harner, without any right whatever, to make entry of the land in her own name.

25. Neither the intervener nor her husband could acquire any right to the land by any residence they may have had on it while it was covered by the uncanceled entry of Rattkammer; and any residence they may have had between the date said entry was cancelled on the record of the local offices and the date they abandoned it and removed therefrom, inured to her husband alone, and in no wise gave her any separate right whatever.

26. And plaintiff says that even though the intervener had been deserted at the time when, and from a home in another place where they were then living together as husband and wife, she could get no right as a deserted wife under the Act of Oct. 22, 1914, or under any other law and could not make an entry as such in her own name.

27. The plaintiff avers that he is advised by counsel, and therefore alleges that upon the cancellation of the entry of Rudolph L. Larson, upon his contest against him, it became and was the duty of the said defendant, the Secretary of the Interior, and the defendant, the Commissioner of the General Land Office, to notify him of such cancellation, and that he had a statutory preference right to enter the land within thirty days after the receipt of said notice; but that they cancelled the entry of said Larson and illegally and

wrongfully dismissed his contest and illegally and wrongfully permitted said intervener Lillie S. Harner, who was without right under any statute, decision or regulation, to make entry in her own name. And plaintiff further avers that the said defendants are now threatening to issue to said Lillie S. Harner, who is not a resident of the District of Columbia and is not under the jurisdiction of this court, a patent for the said land to which plaintiff is legally entitled.

28. The plaintiff avers that by reason of said illegal actions of the defendants, the Secretary of the Interior and the Commissioner of the General Land Office, in dismissing his successful contest and in permitting Lillie S. Harner to make entry of the land, notwithstanding this and notwithstanding his settlement and residence upon the land after the expiration of the preference right of her husband, which he failed to exercise, under his contest, and the land was vacant and subject thereto and his continued residence thereon and full compliance with the homestead law as to improvement and cultivation of the land, and the threatened action of the defendants in issuing patent to the said Lillie S. Harner for said land, he, the plaintiff, is being irreparably damaged in this, that the record title to his said described land has been mutilated, and by reason thereof he has been and is now and until relief shall have been afforded him by the Honorable Court, will continue to be disturbed in his quiet possession and enjoyment of his said land, and by reason of the great faith and credit reposed by the general public in the acts and doings of officials of such high degree the title to his said land has by their aforesaid acts become clouded and the market value thereof greatly lessened, and unless restrained therefrom by this Honorable Court, the defendants will assume the right of authority to issue a patent for said land to the said Lillie S. Harner, to the further injury of the plaintiff.

The Premises considered, The Plaintiff Prays as follows:

First. That the United States writ of subpoena issue out of this Honorable Court, directed to the defendant Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, commanding them and each of them to be and appear in this court on a day certain therein named to answer the exigencies of this bill and to abide — the judgment of the Court.

Second. That pending the final hearing of this cause, the said defendants and each of them may be restrained and enjoined from issuing a patent for said land to the said Lillie S. Harner, or to any other person, except the plaintiff, as by law provided.

Third. That upon the final hearing of this cause, the defendants may be perpetually enjoined and restrained from issuing a patent for said land to the said Lillie S. Harner, or to any other person other than the plaintiff; that the defendants may be commanded and enjoined to cancel upon the records of the General Land Office the said homestead entry and any and all other subsequent proceed-

ings thereunder and in virtue thereof; and that they may be commanded and enjoined to reinstate upon the records of the General Land Office the said contest of Thomas N. Brady and issue to him the usual and proper notice of his preference right of entry of said lands, and to allow said entry if applied for within the time allowed therefor by law, and to take such other and further proceedings as to permit him to obtain the right to a patent by any further additional compliance with the homestead law, if any, as may be required thereby.

Fourth. And that the plaintiff may have such other and further relief in the premises as the nature of the case may require and to this Honorable Court may seem meet and proper.

THOMAS N. BRADY,  
*Plaintiff.*  
S. M. STOCKSLAGER,  
*His Attorney.*

505 McGill Bldg.,  
Washington, D. C.

STOCHSLAGER & HEARD,  
*Attorneys for Plaintiff.*

Service of the above and foregoing complaint acknowledged this 10 day of May 1921.

CHARLES D. MAHAFFIE,  
*Attorney for Defendants.*

Service of the above the same as above.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I am one of the attorneys for the person named as plaintiff in the foregoing bill of complaint; that I had read said bill and know the contents thereof and that the facts therein stated as of personal knowledge are true, and those stated as upon information and belief I believe to be true.

S. M. STOCKSLAGER.

Subscribed and sworn to before me this 10<sup>th</sup> day of May, 1921.

[SEAL.]

W. BERTRAND ACKER,  
*Notary Public in & for D. C.*

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*Motion to Dismiss.*

Filed May 18, 1921.

\* \* \* \* \*

Come now the defendants by their attorneys and move to dismiss the bill of complaint filed in the above entitled suit, and for cause show:



(1) That, as appears on the face of the bill, this suit seeks and involves the direct review of the action of the defendants in administering the public land laws of the United States in their application to a controversy between the plaintiff and other interested parties, which action involved the exercise of judgment and discretion; but that the court is without jurisdiction to review and control the defendants in matters involving the exercise of their judgment and discretion.

(2) That the situs of the land in controversy is without the jurisdiction of this court; that the judgment rendered by the defendants in the controversy before the Land Department was in favor of one Lillie S. Harner, to whom, the bill shows, a patent conveying the legal title to the land, is about to issue; that the granting of the relief sought will operate to deprive the said Harner of any equitable right in the land in controversy; that said Harner is an indispensable party to this suit, in whose absence the suit ought not to proceed.

(3) That if in the adjudication of the controversy between plaintiff and said Harner the defendants have committed error of law, as alleged in the bill of complaint, and so patent the land to said Harner, plaintiff has the usual, complete, and wholly adequate remedy of a suit against said Harner to charge said patent with a trust in his favor.

ALBERT B. FALL,

*Secretary of the Interior;*

WILLIAM SPRY,

*Commissioner of the General Land Office,*

By Their Attorneys, CHARLES D. MAHAFFIE,

*Solicitor.*

C. EDWARD WRIGHT,

*First Assistant Attorney.*

*Decree Dismissing Bill.*

Filed July 22, 1921.

\* \* \* \* \*

This cause came on to be heard on defendants' motion to dismiss the bill of complaint and was argued; and thereupon, the court being fully advised in the premises, it was by the court, on the 24th day of June, 1921,

8 Ordered that the motion to dismiss be sustained with leave to the plaintiff within thirty days to amend his bill of complaint if so advised.

And now on this 22d day of July, 1921, the plaintiff coming into court and electing not to amend his bill of complaint, it is, on the day last above written,

Ordered, adjudged, and decreed that the bill of complaint herein filed be and the same is hereby dismissed, with costs to the defendants to be taxed by the Clerk.

By the Court:

A. A. HOEHLING,

*Justice.*



And from the foregoing decree on the day last above written the plaintiff in open court prays an appeal to the Court of Appeals of the District of Columbia and the same is allowed; the cost bond being fixed at \$100 with permission in lieu thereof to file the sum of \$50 with the Clerk.

By the Court:

A. A. HOEHLING,  
Justice.

*Memorandum.*

August 15, 1921.—Undertaking on appeal approved and filed.

*Assignments of Error.*

Filed August 15, 1921.

\* \* \* \* \*

The appellant, Thomas N. Brady, hereby designates the following assignments of error in a certain final decree of the court, entered in the above entitled cause, July 22, 1921, dismissing the Bill of Complaint filed therein by plaintiff:

1. The court erred in rendering judgment for the defendants.
2. The court erred in not rendering judgment for the plaintiff.
3. The court erred in sustaining the motion of the defendants to dismiss the plaintiff's complaint for any or all of the reasons in said motion stated, or for any other reason.
4. The court erred in not holding the action of the defendants in denying the plaintiff the statutory preference right of entry given him thereby to enter the land involved upon the cancellation of the entry of Rudolph Larson on his contest, which action being beyond the power of the defendants was illegal, wrongful, arbitrary, capricious and absolutely void.
5. The court erred in not holding the defendants illegally, wrongfully, arbitrarily and capriciously allowed Lillie S. Harner the right to make entry of the land as a deserted wife.
6. The court erred in failing to grant the injunction prayed for by plaintiff, and in dismissing his Bill of Complaint.
7. Other errors appearing upon the face of the record.

S. M. STOCKSLAGER,  
*Attorney for Appellant.*

Service of the above assignments of error acknowledged, this 15th day of August, 1921.

C. EDWARD WRIGHT,  
*Attorney for Defendants.*

*Designation of Record.*

Filed August 15, 1921.

\* \* \* \* \*

To Morgan H. Beach, Esq.,  
Clerk Supreme Court, D. C.

SIR:

On behalf of the above-named plaintiff and appellant, I request that you will cause to be prepared the Transcript of Record on appeal in the above-entitled cause; and I hereby designate the following to be included in said Transcript:

1. Bill of Complaint.
2. Motion of Defendants to Dismiss the Bill of Complaint.
3. Decree Dismissing the Bill of Complaint, including endorsement thereon of appeal in open court and order fixing the amount of appeal bond for costs.
4. Assignments of Error.
5. Memorandum of Approval and Filing of bond for costs on appeal.
6. This designation.

S. M. STOCKSLAGER,  
*Attorney for Appellant.*

Service of copy of above designation acknowledged this 15th day of August, 1921.

C. EDWARD WRIGHT,  
*Attorney for Defendants.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 39017 in Equity, wherein Thomas N. Brady is Plaintiff and Albert B. Fall, Secretary of the Interior and William Spry, Commissioner of the General Land Office are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of September, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,

*Clerk.*

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3721. Thomas N. Brady, appellant, vs. Albert B. Fall, Secretary of the Interior, et al. Court of Appeals, District of Columbia. Filed Sep. 30, 1921. Henry W. Hodges, clerk.

11

Tuesday, April 4th, A. D. 1922.

\* \* \* \* \*

No. 3721.

THOMAS N. BRADY, Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,  
Commissioner of the General Land Office.

The argument in the above entitled cause was commenced by Mr. S. M. Stockslager, attorney for the appellant, and was continued by Mr. C. E. Wright, attorney for the appellees and was concluded by Mr. S. M. Stockslager, attorney for the appellant.

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No. 3721.

THOMAS N. BRADY, Appellant,

v.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,  
Commissioner of the General Land Office, Appellees.

*Opinion.*

Mr. Justice Robb delivered the opinion of the Court:

Appeal from a decree in the Supreme Court of the District dismissing appellant's bill to enjoin appellees from issuing a patent for certain public land to Lillie S. Harner, and for other relief.

On October 27, 1915, according to the averments of the bill, Harry S. Harner instituted a contest proceeding against William Rattkamner, a homestead entryman of the land in controversy. On January 6, 1916, the entry was cancelled, but Harner was not notified until December 27, 1918. Under the provisions of the Act of May 14, 1880 (21 Stat., 140), Harner had the preference right of

entry within thirty days after receipt of the notice. On January 1, 1919, or within Harner's thirty-day period, the appellant Brady made a homestead settlement on the land. On February 17, 1919, Rudolph L. Larson filed a homestead entry on the same land and on March 3d, following, Brady instituted a contest proceeding against Larson, alleging a prior settlement. On April 14th, following, Lillie S. Harner, as the deserted wife of Harry S. Harner, filed a petition to intervene, which was allowed on the next day. Hearing was had, at which "all parties appeared in person and by their attorneys." The Register and Receiver decided that Mrs. Harner's rights were paramount to those of "either the contestant or the contester," and recommended the cancellation of the Larson entry and that Mrs. Harner be allowed to enter the land. Brady and Larson both appealed and the Department cancelled the Larson entry, dismissed the contest, and awarded the land to Mrs. Harner. The bill alleges that the Secretary was about to issue a patent to her when this suit was instituted.

It is apparent from the foregoing statement that Mrs. Harner is an indispensable party, for the bill seeks to deprive her of rights to which she has been found entitled. *Foulitz v. Payne*, 50 App. D. C., 155, 269 Fed., 671. Having found that Mrs. Harner's rights were paramount, the Department did not determine the merits of appellant's contest with Larson, and yet we are asked to set aside its finding without the presence of Mrs. Harner and without knowledge of the facts upon which the Department acted. Moreover, the question decided was one within the jurisdiction of the Department and, there being no showing of capricious or arbitrary action, the decision may not be controlled by injunction. *Gaines v. Thompson*, 7 Wall., 347; *Hall v. Payne*, 254 U. S., 343; *O'Brien v. Lane*, 40 App. D. C., 493.

Decree affirmed, with costs. Affirmed.

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Monday, May 1st, A. D. 1922.

\* \* \* \* \*

April Term, 1922.

No. 3721.

THOMAS N. BRADY, Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,  
Commissioner of the General Land Office.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, ad-

judged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ROBB,

May 1, 1922.

14 In the Court of Appeals of the District of Columbia, October Term, 1921.

No. 3721.

THOMAS N. BRADY, Appellant,

v.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,  
Commissioner of the General Land Office, Appellees.

*Petition for Allowance of Appeal.*

Comes now Thomas N. Brady, Appellant in the above entitled cause and shows that on the 1st day of May, A. D. 1922, this Court entered a judgment herein in favor of appellees, affirming a decree of the Supreme Court of the District of Columbia in favor of appellees, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellant, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellant further shows that the said judgment of this court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of Section 250 of the Judicial Code in that the jurisdiction of the trial court is in issue.

He further shows that said judgment is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said Section 250, in that the validity of an  
15 authority exercised under the United States and the existence and scope of a power or duty of the appellees, said appellees being officers of the United States, are drawn in question.

He further shows that said judgment is subject to review by the Supreme Court of the United States under the sixth paragraph of said Section 250, in — the proper construction of the Acts of Congress under which appellant claims, said appellees being officers of the United States, are drawn in question.

He further shows that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said Section 250, in that the proper construction of the Acts of Congress under which appellant claims, is drawn in question by the appellees, who were defendants below.

Wherefore, he prays the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of the errors complained of; and amount of bond fixed at \$300; that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United

States; and that the mandate of this Court be stayed until further orders.

THOMAS N. BRADY.

By His Attorney, S. M. STOCKSLAGER.

16 In the Court of Appeals of the District of Columbia, October Term, 1921.

No. 3721.

THOMAS N. BRADY, Appellant,

v.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,  
Commissioner of the General Land Office, Appellees.

*Assignment of Errors.*

Comes now the appellant, by his attorney, and says that in the record and proceedings of the Court of Appeals in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said appellant in this, to wit:

1. That the Court erred in affirming the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant.

2. That the Court erred in not reversing the decree of the Supreme Court of the District of Columbia herein issued.

3. That the Court erred in holding Lillie S. Harner was an indispensable party to the action.

4. That the Court erred in holding the questions decided were within the jurisdiction of the Department and there was no showing that the action was capricious or arbitrary.

17 5. That the Court erred in not holding and deciding that the cancellation of Rattkammer's entry on Harner's contest made the land open to settlement eo instanti subject only to Harner's preference right, and that upon his failure after due notice to exercise such right by entry, neither he nor his wife had any interest in, or right to the land.

6. That the Court erred in not holding that Brady's settlement and residence on this unoccupied land with his family in January, 1919, in the vacant house on it, after the cancellation of Rattkammer's entry, but prior to the expiration of the preference right period in which Harry Harner who had contested it was required to make entry, and his continued residence and compliance with the law, was a valid settlement, subject only to the exercise of this preference right, which was never done, and that the failure to exercise this right by Harner gave Brady a valid right

against all persons, dating from his settlement, which right is statutory and cannot be defeated without cause.

7. That the Court erred in not holding a qualified homestead settlement on lands subject thereto, is presumed to have been made in good faith, which could be questioned only upon specific charges of fraud and sustained by the same degree of proof of such charges, as is required in charges under a penal statute.

8. That the Court erred in holding it was necessary for Brady to make any showing as to his original intention in settling on the land with his family, as it was open to settlement under the homestead law from January 6, 1916, the date the Commissioner canceled Rattkammer's homestead entry, subject only to the exercise by Harry Harner of his preference right within the limits fixed by statute, which was never exercised.

9. That the Court erred in holding Brady's rights were affected by his intention when he settled on the land with his family, as his intention was clearly shown by his contest against Larson, and his affidavit attached thereto, made and filed March 13, 1919, was to acquire title under the homestead law, which latter date was long before Lillie S. Harner's intervention or connection in any way with his contest against Larson's entry of record.

10. That the Court erred in holding such original intention in making settlement could affect in any way his rights against Larson or Lillie S. Harner, neither of whom had any interest whatever in the land.

11. That the Court erred in not holding that the cancellation of Larson's entry on Brady's contest, (no other contest having been pending, or any superior right), gave him a statutory right which the Department was without power to deny or disregard.

12. That the Court erred in not holding that Larson's entry was canceled solely upon Brady's contest, because of his prior and continued residence in the only house on the land, of which Larson was required to take notice and in not according to him the preference right provided by the statute.

13. That the Court erred in not holding that the dismissal of Brady's contest against Larson and permitting Lillie S. Harner, without any right under any law, to make entry while Brady was living on the land with his family in full possession of all parts of it, complying with the homestead law, was capricious and arbitrary.

14. That the Court erred in coupling with the finding of these facts, any reference to the renting by Harry Harner, without the knowledge of his wife, a small alfalfa field for hay and pasturage, Mrs. Harner testifying the only house on the land which was occupied by Brady and his family, was not rented to any one.



15. That the Court erred in sustaining the departmental decision which held the long continued connection of Mrs. Harner and her husband with the land and their efforts to comply with the law, raised equities which, without any legal right, are, as held by the Department, sufficient to justify allowing her to make entry, was not capricious or arbitrary.

16. That the Court erred in not holding that the action of the Department in allowing Mrs. Harner to enter the land, admittedly without any right whatever under any law, was not only capricious and arbitrary, but beyond its power and therefore, absolutely void.

17. That the Court erred in not holding the Department was without power to allow Mrs. Harner to make entry of the land, except under some Act of Congress, with the terms of which she had complied and that its action admittedly upon equities alone, is *ultra vires*.

18. That the Court erred in sustaining the departmental decision holding Mrs. Harner to be entitled to credit for residence on the land during the pendency of Rattkammer's entry.

19. That the Court erred in holding Mrs. Harner who was not living on the land at the date of claimed desertion and admitted that she had not been deserted for the period of a year, could avail herself of the provisions of the Act of October 22, 1914, or under any other Act.

20. That the Court erred in failing to grant the relief prayed for in the bill of complaint.

21. That the Court erred in failing to grant the mandamus and injunction prayed for.

Wherefore, the appellant prays the allowance of an appeal sending case to the Supreme Court that for the errors aforesaid, and other errors appearing in the record of said Court of Appeals, and the fixing of bond at \$300 the said judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said Court of Appeals with instructions to reverse the decree of the Supreme Court of the District of Columbia in said suit rendered, and for such further proceedings in said suit as may be determined by the Supreme Court of the United States to the end that justice may be done in the premises.

THOMAS N. BRADY,  
By His Attorney, S. M. STOCKSLAGER.

Receipt of copy of the above and foregoing petition for allowance of appeal to the United States Supreme Court, accompanied by assignment of errors, this 27th of July, 1922.

EDWIN S. BOOTH,  
*Attorney for Defendant- (Appellees).*

21           Endorsed: No. 3721. In the Court of Appeals of the District of Columbia. Thomas N. Brady, Appellant, vs. Albert B. Fall, Secretary of the Interior and William Spry, Commissioner of The General Land Office, Appellee. October Term 1921. No. 3721. Petition for Allowance of Appeal and Assignment of Errors. Court of Appeals, District of Columbia. Filed July 28, 1922. Henry W. Hodges, Clerk. S. M. Stockslager, Attorney for Appellant.

22

Monday, August 7th, A. D. 1922.

\* \* \* \* \*

No. 3721.

THOMAS N. BRADY, Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, et al.

On consideration of the appellant's petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said petition be, and the same is hereby, granted, and the bond for costs is fixed at the sum of three hundred dollars.

\* \* \* \* \*

23

*(Bond on Appeal.)*

Know all Men by these Presents, That we Thomas N. Brady, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Albert B. Fall, Sec't'y of the Interior and William Spry, Commissioner of the General Land Office, or their successors in office in the full and just sum of Three hundred dollars, to be paid to the said Albert B. Fall, Sec't'y of the Interior and William Spry, Commissioner of the General Land Office, or their successors in office or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Thomas N. Brady and Albert B. Fall, Sec't'y of the Interior and William Spry, Commissioner of the General Land Office, a decree was rendered against the said Thomas N. Brady and the said Thomas N. Brady having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Albert B. Fall; Sec't'y of the Interior, and William Spry, Commissioner of the General Land Office citing and admonishing

them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Thomas N. Brady shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS N. BRADY,  
By S. M. STOCKSLAGER, [SEAL.]  
Atty. [SEAL.]

[Seal of Fidelity and Deposit Co. of Maryland.]

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND, [SEAL.]  
By F. S. KEY-SMITH, [SEAL.]  
Atty. in Fact.

Sealed and delivered in presence of—

PAUL S. PARRIS.

LORETTA MULIKIN.

PAUL S. PARRIS (as to both parties).

Approved by—

CHAS. H. ROBB,

*Justice Court of Appeals of  
the District of Columbia.*

[Endorsed:] No. 3721. Thomas N. Brady, appellant, vs. Albert B. Fall, etc., et al. Bond for costs on appeal to Supreme Court, U. S. Court of Appeals of the District of Columbia. Filed Aug. 15, 1922. Henry W. Hodges, Clerk.

24 UNITED STATES OF AMERICA, ss:

To Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Thomas N. Brady is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 15th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

CHAS. H. ROBB,  
*Associate Justice of the Court of  
Appeals of the District of Columbia.*

Service acknowledged Aug. 15, 1922.

EDWIN S. BOOTH,

*Counsel for Appellees, Solicitor.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Aug. 15, 1922. Henry W. Hodges, clerk.

25 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 24 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas N. Brady, Appellant, vs. Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, No. 3721, April Term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of August, A. D. 1922.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,

*Clerk of the Court of Appeals,*

*of the District of Columbia,*

By MONCURE BURKE,

*Assistant Clerk.*

Endorsed on cover: File No. 29,141. District of Columbia Court of Appeals. Term No. 591. Thomas N. Brady, appellant, vs. Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office. Filed September 13th, 1922. File No. 29,141.